MEMORANDUM

TO: Members, Clark Fork Basin Water Management Task Force (Task Force)
FROM: Gerald Mueller
SUBJECT: Summary of the January 8, 2007 Task Force Meeting
DATE: January 27, 2007

Participants

The following people participated in the Task Force meeting:

Task Force Members:

Bill Slack	Lower Flathead
Fred Lurie	Blackfoot Challenge
Harvey Hackett	Bitterroot Water Forum
Jim Dinsmore	Granite Conservation District
Marc M. Spratt	Flathead Conservation District/Flathead Chamber of Commerce
Matt Clifford	Clark Fork Coalition

Ex Officio Member

Sen. Verdell Jackson

Staff:

Gerald Mueller	Consensus Associates

Public

John Tubbs	DNRC Water Resources Division
Rich Moy	DNRC Water Management Bureau

Meeting Agenda

- November 20, 2006 Meeting Summary
- Membership Update
- House Joint Resolution 3 Implementation Update
- Ground Water Data Legislation
- Task Force Funding
- USFS Compact
- Public Comment
- Next Meeting

November 20, 2006 Meeting Summary

The Task Force made no change to the November 20, 2006 meeting summary.

Membership Update

Gerald Mueller discussed the situation regarding membership appointments. The statute establishing the Task Force, 85-2-350 MCA, provides that an entity designated by the Governor's Office shall "...convene and coordinate a Clark Fork River basin task force... and...ensure that all watershed and viewpoints within the basin are adequately represented on the task force..." The statute also sets forth sub-basins of the Clark Fork River basin that must be represented on the Task Force, that members serve two year terms, and the Confederated Salish and Kootenai tribal government has the right to appoint a representative to the task force. In 2001, when the Task Force was first formed the

designated entity was the Montana Consensus Council. The Consensus Council sought to identify interests that wished to participate on the Task Force and allowed each interest to select its own representative to serve as a member. When Governor Schweitzer took office, he designated DNRC as the entity to convene and coordinate the Task Force. Mary Sexton, the DNRC Director, therefore has the responsibility to appoint Task Force members.

When Bill Slack retired from his position with the Flathead Joint Board of Control (FJBC), FJBC wrote to Ms. Sexton asking that Steve Hughes, a FJBC Board member, be appointed to replace Mr. Slack. Ms. Sexton then wrote to Gerald Mueller asking that the Task Force propose three names from which she might choose. Also, since the last Task Force meeting, the Flathead Lakers have recommended that one of its board members, Ted Williams, be appointed to the Task Force.

Mr. Mueller also noted that Avista has indicated that it wishes to change its member from Steve Fry to Nate Hall. Finally, the lower Clark Fork sub-basin, formerly represented by Jay Stuckey, remains vacant, and with Phil Tourangeau's death, the Confederated Salish and Kootenai Tribes have not been sending a representative to Task Force meetings.

John Tubbs stated that he will visit with Ms. Sexton to make sure that she understands that collaborative groups work best when members are self-selected by the interests they represent.

The Task Force asked Mr. Mueller to write to the James Steele Jr, the Confederated Salish and Kootenai Tribal Chairman, expressing regret about Phil Tourangeau's passing, and asking if the Tribes would consider sending another representative to Task Force meetings.

House Joint Resolution 3 Implementation Update

BOR Letter - On December 6, 2006, Regional Director Bill MacDonald replied to Mary Sexton's letter of October 17, 2006. In his letter, Mr. MacDonald set out the steps together with their estimated costs and time requirements to complete a contract for Hungry Horse water. See Appendix 1. The total of the estimated costs of the steps discussed in Mr. MacDonald's letter exceeds $2 million, which includes preparation of an environmental impact statement (EIS). The estimated time requirement appears to be on the order of 4 years.

Water Marketing Legislation - Mr. Mueller reviewed his December 18, 2006 memorandum to the Task Force on the state's existing water marketing statute, 85-2-141 MCA. See Appendix 2. This statute limits the state to leasing no more than 50,000 acre-feet throughout the state. As noted in the memorandum, 85-2-141 MCA was developed in the mid-1980s in response to the ETSI coal slurring pipeline proposal and the US Supreme Court Decision in Sporhase vs. Nebraska. The statute was passed to provide Montana control over possible out-of-Montana water transfers without banning them, which the Sporhase decision prohibited. BOR Regional Director MacDonald stated at a September 25, 2006 meeting with Mary Sexton that the state could contract for more water than it would initially use and pay for the water only as it would be used. While the state has not estimated the amount of water needed to supply new consumptive uses over a period such as 50 years that might correspond to the contract life, the amount over a period of 50 years would likely exceed the 50,000 acre-feet leasing cap.

Task Force Action - The Task Force agreed to seek legislation that would remove the 50,000 acre-feet cap in a manner that does not raise the out-of-basin transfer concerns that led to the existing statute. The Task Force will seek DNRC advice about the size of a new cap. Senator Jackson will sponsor the bill.

Funding for next Steps Toward a Hungry Horse Contract - Based on BOR Regional Director Bill MacDonald's December 6, 2006 letter to Mary Sexton, the first step in the contracting process appears to be the new cost allocation study that would include irrigation, municipal, and industrial uses as new uses for Hungry Horse water in addition to the existing uses of flood control and hydropower generation. Mr. MacDonald's letter includes an estimate of 1.5 years to conduct this study. Starting this step now would avoid the loss of two years until the next DNRC budget cycle and would allow the state time to work with the Montana Congressional delegation to seek federal funding to pay for some portion of the remaining contracting costs such as the EIS preparation.

Task Force Action - The Task Force agreed to seek introduction of a bill to appropriate $260,000 to DNRC to pay BOR for the study during the 2008-2009 biennium.

Finalizing the Hungry Horse Policy Paper - The Task Force reviewed the Hungry Horse paper that Mr. Mueller had previously sent to the Task Force members. See Appendix 3.

Task Force Action - The Task Force adopted the revised paper with one change, on page three each time the paper states "water is not likely to be available for appropriation" insert the word "legally" before appropriation, so that the phrase would read, "water is not likely to be legally available for appropriation."

Ground Water Data Legislation

The Task Force discussed a draft of ground water legislation dated December 18, 2006 which Mr. Mueller had previously sent to the Task Force. See Appendix 4. This draft was written to meet the three objectives set at the November 20, 2006 Task Force meeting:

- Set uniform reporting requirements for well log and pump test data;
- Require well drillers to record and report geophysical data; and
- Require all groundwater data collected using public funds to be included in the Ground Water Information Center (GWIC) data base which is administered by the Montana Bureau of Mines and Geology (MBMG).

Mr. Mueller also reported that he had recently discussed these objectives at the first meeting of the Watershed Coordinating Council's Ground Water Working Group. This group includes several program managers and other staff from the DNRC and the Montana Departments of Environmental Quality (DEQ), Agriculture, and Transportation. The staff of these agencies supported the idea of doing a better job of centralizing ground water data in the MBMG GWIC. However, they were concerned about the amount of work that would be involved with trying to send all ground water data to GWIC. Some of this data apparently exists in voluminous paper reports, and would require significant staff time to gather and send to GWIC. Holly Franz, in response to this concern, suggested in a email requiring that only abstracts of the ground water data be sent to GWIC. Tom Patton, MBMG's Ground Water Assessment Program manager, send comments in response to this idea that abstracts could take a lot of time to prepare and not really be worth too much to those seeking data.

Also at the November 20, 2006 meeting, the Task Force tentatively decided to support funding for a full-time GWIC data editor. In response to Mr. Mueller's request, Mr. Patton estimated that the cost of this position including benefits would be about $54,000 annually.

Task Force Action - The Task Force decided to proceed with a bill that would do to things.

First, it would require state agencies to forward aquifer pump test data to MBMG in a form to be developed by DNRC in consultation with DEQ and MBMG. Second, it would require well drillers to report new well locations to MBMG using two methods on a form specified by DNRC in consultation with the Board of Water Well Contracts and MBMG. The Task Force decided not to pursue funding for the GWIC editor position. Senator Jackson agreed to sponsor this bill.

Task Force Funding

The Task Force agreed to seek an appropriation for $45 thousand per year for the coming biennium, consistent with the budget agreed to at its November 20, 2006 meeting. Gerald Mueller will seek guidance as to the source for this funding from DNRC and will solicit support from DNRC and the Governor's Office for this appropriation.

USFS Compact

At its November 20, 2006 meeting, the Task Force asked Marc Spratt to prepare comments on the draft compact negotiated by the Montana Reserved Water Rights Commission and the US Forest Service. He did so and Mr. Mueller circulated them to the Task Force. Comments received by Mr. Mueller on Mr. Spratt's draft indicated that all members did not support sending them.

Task Force Action - After a discussion of the content of the draft compact, the Task Force decided not to send comments to the Compact Commission and the USFS and not to take a position as a group on the draft before the legislature.

Public Comment

There was no additional comment.

Next Meeting

The next meeting was not scheduled. Mr. Mueller will schedule a meeting around legislative action on the Task Force bills.

Appendix 1

United States Department of the Interior

BUREAU OF RECLAMATION
Pacific Northwest Region
1150 North Curtis Road, Suite 100
Boise, Idaho 83706-1234

DEC 6, 2006

Ms. Mary Sexton
Director
Department of Natural Resources and Conservation
State of Montana
P.O Box 201601
Helena, Montana 59620-1601

Subject: Hungry Horse Reservoir, Future Contracting Opportunities

Dear Ms. Sexton:

The Following information is provided in response to your letter of October 17, 2006, concerning the above subject wherein you requested estimates of the expected costs and schedules for each of the various processes required to obtain water from Hungry Horse Reservoir, as well as estimates of the likely cost of water for municipal and industrial and irrigation uses. You also requested information about the Bureau of Reclamation charges for municipal and industrial water from other Reclamation storage projects in the basin.

While we have tried to be as responsive to your request as possible given the information we currently have, please understand the ultimate cost, and time frames identified for each of the activities could vary greatly depending on the specific circumstances involved.

In looking at contracting for water from Hungry Horse Reservoir, there appears to be seven key areas that will require the most time and resources to complete. These are: (1) completion of a revised cost allocation, (2) completion of land classification studies if irrigation water is involved, (3) completion of an ability-to-pay study if irrigation water is involved, (4) completion of environmental compliance activities, (5) completion of a water needs assessment, (6) obtaining the required approval to enter into new contracts, and (7) preparation and negotiation of the contracts. All of these activities are discussed in further details below. Please understand that actions for many of the activities identified would be occurring simultaneously, as opposed to sequentially.

Key Areas for the Subject Contracts:
Concerning the cost reallocation, it appears that we would basically have to start at "ground zero" as we would be allocating to two purposes that have previously not had costs allocated to them.

This would require gathering of construction cost data (as built) and calculation of benefits for each purpose (i.e., power, flood control, irrigation, municipal, industrial, fish and wildlife, recreation, etc.) under the new operation criteria. We would also need engineering cost estimates correlated with actual as-built project costs for single purpose projects for flood control, irrigation, power, recreation, etc., as well as multi-purpose projects without each of those purposes. This will also require associated hydrologic studies and estimates of operation and maintenance costs. It is a complex process that necessitates a considerable amount of coordination between involved Federal and state agencies. The revised cost allocation would also require Congressional approval. With that information, we estimate the time and costs for economic and engineering work is approximately 300 staff days over a period of 1.5 years at an estimated cost of $260,000.

With respect to land classification studies, a great deal depends on the number of acres involved. The following represents estimates for three acreage ranges: (1) 500 through 5,000 acres, $9 per acre plus $5-8,000 for an economic analysis with an estimated completion time of 4 months, (2) 5,000 through 10,000 acres, $6 per acre plus $5-8,000 for an economic analysis with an estimated completion time 6 months, and (3) over 10,000 acres, $5 per acre plus $5-8,000 for an economic analysis with an estimated completion time of 8 months.

Reclamation would be required to complete an ability-to-pay study if irrigation water is involved. This analysis is not needed for municipal and industrial water supplies. Depending on the total acreage involved, we estimate it would take approximately 240 hours to complete the analysis with an estimated cost of $25,000.

As the process proceeds, Reclamation would initiate National Environmental Policy Act (NEPA) and Endangered Species Act (ESA) compliance activities. Given the volumes of water involved, we anticipate that an Environmental Impact Statement (EIS) would be required. NEPA compliance activities would include necessary public scoping meetings and hearings, Fish and Wildlife Coordination Act and cultural resource consultations, and consultations with Tribes on Indian trust assets. ESA activities would include consultation with National Marine Fisheries Service and U.S. Fish and Wildlife Service. We estimate that it would take 2-4 years to complete an EIS at an estimated cost of $1-2 million.

Reclamation with participation from the contractor(s) would initiate a water needs assessment study (including possible mitigation water, modeling. etc.) to identify the needs of the contractor(s). This information would also be used for NEPA/ESA compliance activities. We estimate it would take us approximately 40 hours to complete this activity at an estimated cost of $2,600.

Nearing completion of the above activities, Reclamation would begin the internal process to request approval from the Commission of Reclamation to negotiate and execute new contract(s). Items that must be addressed in such a request include, but are not limited to: identification of contractor, authority to contract, contractor's need for water and proposed use, quantity of water requested, compliance with NEPA and public participation requirements, explanation of water rate calculation, cropping information, water conservation measures, term of contract, operation and maintenance responsibility, etc. We estimated that it would take 40 hours at an estimated cost of $2,600.

Assuming we receive the required approval to proceed with the new contract(s), the following activities would be required: preparation of draft contracts, contract negotiation meetings, public participation requirements, etc. We estimated it would take us approximately 50 hours to prepare the draft contract and execution documents at an estimated cost of $3,250. This does not include any potential negotiation time over specific contract provisions or time associated with public meetings.

It should be noted that the above information does not address activities that are the contractor's responsibility (e.g., landholder election, court confirmation, etc.). Additionally, please be aware the contractor(s) have an opportunity to reduce their payments to Reclamation based on their level of participation for the various activities (e.g., providing requested information in a timely manner us opposed to Reclamation gathering information independently).

As indicated during the meeting on September 25, 2006, Reclamation's costs associated with the above activities are considered reimbursable. Consequently, if the decision is made to proceed, Reclamation would prepare a written cost agreement(s) to cover the estimated costs of the proposed action(s) to be reviewed and executed with the respective contractor(s) prior to Reclamation taking additional action. We estimate that it would take us approximately 16 hours to prepare the subject cost agreement(s) at an estimated cost of $1,040. This does not include any potential negotiation time over specific provisions of the agreement. The cost agreement would most likely contain provisions for quarterly activity reporting as well as specific reimbursement/billing criteria.

Upon receipt of the executed cost agreement(s) and required advance payment(s), Reclamation would proceed with the contracting parties. The advance payment would be held in a special account established for the contractor located in Reclamation's books and applied towards the United States' costs.

With respect to your request for estimated rates for municipal and industrial and irrigation uses from Hungry Horse Reservoir, absent a revised cost allocation and available local market rate information we are not in a position to provide this information at this time. Current charges for municipal and industrial water supplies from other Reclamation storage projects in the region range from approximately $28-78 per square-foot, which do not include any additional charges that may be imposed by irrigation districts involved with the subject water deliveries.

Hopefully you will find the above information helpful in the decision making process. As you can see, it appears that this process could take several years to complete. Please understand the above represents Reclamation's best estimate, as this is a complex process composed of a myriad of variables which are difficult to predict with any certainty at this time.

As indicated during the September meeting, additional staff-to-staff discussions are most likely warranted to assist with the State's decision making process. Please feel free to contact Mr. Ryan Patterson at 208-378-5340 if you have any questions.

Sincerely,

J. William McDonald
Regional Director

Appendix 2

Clark Fork River Basin Task Force

C/O Gerald Mueller
440 Evans
Missoula, MT 59801
(406)543-0026

MEMORANDUM

Date: December 18, 2006
To: Clark Fork Task Force
From: Gerald Mueller
RE: 1985 Select Committee on Water Marketing Report & Draft Water Marketing Legislation

Holly Franz kindly supplied me with a copy of the January 1985 "Summary of the Report of the Select Committee on Water Marketing to the 49th Legislature." The committee was chaired by Sen. Jean Turnage and included Rep. John Shontz (Vice Chair), Rep. Dan Kemmis, Rep. Dennis Iverson, Rep. John Harp, Sen. Chet Blaylock, Sen. Dave Manning, and Sen. Jim Shaw.

The stimuli for the committee and its report were the ETSI coal slurry pipeline proposal and the US Supreme Court decision in Sporhase vs. Nebraska, which found, in the committee's words, that "...water is an article of interstate commerce and that absolute state statutory bans against the exportation of water are unconstitutional as violations of the dormant interstate compact clause." The focus of the report was clearly the Missouri and Yellowstone basins as the demand for downstream state water use at that time was east of the continental divide.

To control, but not prohibit, exportation of water out of state, the committee recommended creating a state leasing program capped at 50,000 acre-feet (the amount of water that would have been used in the ETSI coal slurring pipeline). The report also envisioned that water marketing would, or could, be a source of funding for various water related activities, including administration of the water leasing program, supporting the adjudication program, funding a centralized water resource data management system, providing technical and financial support to water reservation applicants, repairing and restoring state owned water projects and municipal water systems, funding development of water development projects, developing an inventory of and classification of the state's groundwater resources, providing for the expenses and administration of a legislative water policy committee, etc.

Other interesting recommendations and statements included:

- Granting DNRC continuing authority to acquire water from all federal reservoirs in the state.
- Planning for and setting aside water for the future needs of the state by an "aggressive use of the water reservation system."
- Creating "...a permanent legislative water policy committee to advise the Legislature, in an ongoing manner, on water policy and issues of importance to the state." Over the ensuing biennium, the committee recommended that the water policy committee consider "...constraints on consumptive use and water development brought about by extensive hydropower reservations in both the Missouri and Yellowstone basins..."
- The statement that "Accurate predictions of future water needs are important both to water resource management within the state and in preparation for negotiations or litigation with other states."

- The draft legislation accompanying this memorandum amends the water marketing statute (85-2-141 MCA) that was passed as a result of the 1985 Select Committee report in following ways:
- In (3)(c), language related to Hungry Horse requiring an agreement with the federal government to share water marketing revenue with the state is deleted. Our intent is not to use state water leasing revenue to fund purposes other than covering the state's costs for contracting for the water and leasing it to basin water users, so this language is unnecessary.
- In (4), the cap for the leasing program is raised to 1 million acre-feet for water used within the basin in which the federal reservoir is located. The 1 million acre-feet is a place holder pending DNRC deciding what cap it wants for the statewide in-basin leasing program. The existing 50,000 acre-foot cap is retained for out-of-basin transfers.
- A new (5) is added clarifying that no cap exists on the amount of water for which the state can contract from any federal reservoir. Recall that Regional Director MacDonald told Mary Sexton that the state can contract of a larger amount of Hungry Horse water than it can use now, and that payment for the water would be made only when it is actually used. In effect by contracting, the state can reserve water in federal reservoirs for future use; hence a cap is not a good idea.

DNRC is reviewing the draft legislation and will get comments to us.

85-2-141. Water leasing program. (1) There is a water leasing program administered by the department on behalf of the state of Montana.

(2) The department may acquire rights to water needed for leasing under this program through appropriation of water in its own name or by agreement with or purchase from another holder of water rights.

(3) Water for leasing under the water leasing program must be obtained from the following sources:

(a) any existing or future reservoir in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered;

(b) Fort Peck reservoir, if an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenue with the state is in effect;

(c) Tiber, Canyon Ferry, Hungry Horse, or Yellowtail reservoir ~~if and as long as there is an agreement between the department and the federal government concerning the acquisition of water and sharing of revenue with the state from one or more of these reservoirs~~; and

(d) any other existing or future federal reservoir:

(i) located in a basin concerning which a temporary preliminary decree, a preliminary decree under 85-2-231, or a final decree under 85-2-234 has been entered; and

(ii) for which and for so long as there is an agreement between the department and the federal government concerning the acquisition of water and the sharing of revenue with the state.

(4) Water may be leased for any beneficial use. The amount of water that can be leased under this program for all beneficial uses may not exceed ~~50,000~~ 1,000,000 acre-feet from any existing reservoir so long as the water is used within the basin that the reservoir is located. Leases by the department of water that would be tranferred to another basin may not exceed 50,000 acre-feet.

(5) No limit exists on the amount of water for which the department may contract from any federal reservoir.

(~~5~~6) The term of any lease may not exceed 50 years. A term may be extended up to another 50 years if the department again determines the desirability of leasing by applying the considerations in subsection (~~7~~8). In making a redetermination, the department may require the completion of an environmental impact statement in accordance with subsection (~~6~~7).

(~~6~~7) The department shall require the completion of an environmental impact statement under the provisions of Title 75, chapter 1, for lease applications that would result in the consumption of 4,000 acre-feet a year or more and 5.5 cubic feet per second or more of water and for any other application for which an environmental impact statement is required by law. The department shall require the completion of an environmental impact statement whenever the cumulative effect of more than one application for a lease would constitute a probable significant environmental impact.

(~~7~~8) Upon application by a person to lease water, the department shall make an initial determination of whether it is desirable for the department to lease water to the applicant. The determination of desirability must be made solely on the following considerations:

(a) the content of the environmental impact statement, if required;

(b) whether there is sufficient water available under the water leasing program; and

(c) whether the criteria, except as to legislative approval, set forth in 85-2-311 have been satisfied.

(~~8~~9) The department shall for any agreement require commercially reasonable terms and conditions, which may include the requirement that up to 25% of the water to be leased be made available to a potential user for any beneficial use upon payment by the user of the costs of tapping into and removing water from the applicant's project. The department may differentiate in pricing, depending on the proposed beneficial use of the water.

(~~9~~10) The lease of water or the use of water under a lease does not constitute a permit, as provided in 85-2-102, and does not establish a right to appropriate water within the meaning of Title 85, chapter 2, part 3.

(~~10~~11) For purposes of the water leasing program established in this section, it is the intent of the legislature that the state act as a proprietor.

REVISED DRAFT

Appendix 3

Hungry Horse Reservoir and Clark Fork River Basin Water Use

Prepared by the Clark Fork River Basin Task Force

January 2007

When it leaves Montana and crosses into Idaho, the Clark Fork River is the state's largest river.[1] One might think therefore that water availability is not an issue in the Clark Fork River basin. Unfortunately, this is not the case. Portions of the basin such as much of the upper Clark Fork above Missoula and the Bitterroot River are used to water scarcity.[2] But from a water rights perspective, the availability of water for new uses is questionable in the basin as a whole, and many uses based on water rights developed in the last 50 years may be at risk to calls by senior water right holders. Clark Fork population levels are growing rapidly and are projected to increase from about 320,000 in 2000 to 350,000 by 2010.[3] Growth is likely to continue after 2010. This population growth and the increased economic activity that will accompany it will require water. Consistent with its statutory mandate, the Clark Fork River Basin Task Force (Task Force) has sought a means to supply these growing water needs within the framework of the state's existing water allocation system.[4] As this paper will discuss, the Task Force has concluded that this challenge can be met by using water now stored in Hungry Horse Reservoir to provide for both new basin uses and provide security for many existing water users. How Hungry Horse water is managed is critical to the basin's future.

Water Rights

According to Montana's Constitution, "All surface, underground, flood, and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and are subject to appropriation for beneficial uses as provided by law."[5] The state appropriates water for beneficial uses through the "first-in-time, first-in-right" allocation system in which water is allocated based on the order in which it was first put to a beneficial use. A person with the senior, i.e. earliest, water right is entitled to use all of the water from a water body until her or his water right is filled. The senior right holder need not share water when the supply is short and can issue a call on junior users requiring them to stop diverting water. Prior to 1973, a water right was obtained simply by diverting water and putting it to a beneficial use. No action by

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[1]The average annual discharge at the Montana border of Montana's rivers are: Clark Fork River, 15.6 million acre-feet; Kootenai River, 10.1 million acre-feet; Yellowstone River, 9.4 million acre-feet; and Missouri River, 7.5 million acre-feet. See *Facts about Montana's Water,* Montana DNRC, September 1992.

[2]Both the upper Clark and Bitterroot River basins are closed to the issuance of most new surface water rights. See 85-2-336 and 85-2-344, respectively.

[3]See Appendix 3, The Changing Economy of Montana's Clark Fork Basin by Dr. Larry Swanson in the *Clark Fork Basin Watershed Management Plan*, September 2004.

[4] The Clark Fork Task Force was created in August 2001 pursuant to 85-2-350 MCA. Its members are appointed by the DNRC Director to ensure balanced representation of the basin's watershed and water interests. The statute directed the Task Force to prepare a water management plan for the Clark Fork River basin that: (1) identified options to protect the security of water rights; (2) provided for the orderly development of water; and (3) provided for the conservation of water in the future. The water management plan was submitted to the Legislature and the Governor in September 2004. Most of its recommendations were adopted into the State Water Plan. The Task Force's continuing mandate includes " ...prepar(ing) proposed amendments to the state water plan provided for under 85-1-203 related to the Clark Fork River basin..." and "...identify(ing) short-term and long-term water management issues and problems and alternatives for resolving any issues or problems identified." See 85-2-350 (1) and (3)(a).

[5]Article IX, Section 3(3)

state government was required. Since the passage of the 1973 Water Use Act, obtaining a water right requires a permit from the Montana Department of Natural Resources and Conservation (DNRC). Because pre-1973 water rights were often not recorded, the state is currently engaged in a state-wide water rights adjudication in the Montana Water Court to determine and record all water rights in a central state data base. When the adjudication is complete, all Clark Fork basin water rights may be combined into one final water rights decree.

The last water rights on the Clark Fork River just before the river exits Montana are owned by Avista Corporation. Avista owns three hydropower rights at its Noxon Rapids Dam with 1951, 1959, and 1974 priority dates.[6] The 1951 and 1959 rights were confirmed in an August 27, 1986 decree issued by Montana Water Judge Holter. The 1986 decree is subject to an additional objection period before the issuance of a final decree by the Montana Water Court. Avista obtained its 1974 rights through the DNRC permit required by Water Use Act. Avista's water rights, which total 50,000 cfs, are based on the hydroelectric facility's turbine capacity and are sufficient to utilize almost all of the flows leaving the basin. Clark Fork River flows greater than 50,000 cfs occur only 6-8% of the time over the entire 90 year period of record. Flows greater than 50,000 cfs generally occur 22 days in May and June of wetter years. This suggests that surface water, and groundwater connected to surface water, is legally available for future appropriation in the basin only during the period when Avista's water rights are filled. Also, as of 1998, Montana water right records indicated that 7,805 (30%) of the 26,274 surface water uses in the Clark Fork River basin are junior to the earliest (1951) water right at Noxon Rapids Dam. Some 3,125 (12%) uses are junior to the latest (1974) Noxon Rapids water right. The uses with junior rights include 2,518 (32%) municipal, domestic, and other in-city uses, and 1,268 (16%) stock water uses. These junior rights are potentially subject to a water rights call whenever Avista's rights are not filled.[7]

PPL Montana owns hydropower rights at two basin dams, Kerr and Thompson Falls. These rights also pose constraints on new and existing water uses. PPL Montana owns two water rights for the production of hydroelectricity at Kerr Dam on the Flathead River. One right is for the amount of water necessary to fill the storage reservoir at any time. The second right is based on the dam turbine capacity and is for 14,540 cfs for power generation. The priority date for both water rights is April 3, 1920. These rights have not yet been adjudicated by the Montana Water Court. According to flow records, PPL Montana's rights at Kerr are filled only during the high-flow periods of high spring runoff. In 5 of 30 years, the Kerr rights are not filled at any time. In 11 of 30 years, the Kerr rights are filled 32 days or less. On average, the Kerr rights are filled only 56 days per year. At the Thompson Falls Dam, PPL Montana owns eight water rights for the production of hydroelectricity, three for storage and five for flows through the dam turbines.[8]

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[6]The amounts and priority dates of Avista's three rights are: 35,000 cfs with a priority date of February 20, 1951; 5,400 cfs with a priority date of April 3, 1959; and 15,000 cfs with a priority date of November 19, 1974. The sum of the three water rights is capped at 50,000 cfs.

[7]The senior right holder can choose which junior users to call. Calling larger junior users would be more cost effective for the senior user. Thus, larger junior users are probably at greater risk for a call.

[8]Three of the rights, 76N-W-094415-00, 76N-W-211941-00, and 76N-W-211942-00, are for storage and can be used to draft and refill the reservoir for the purpose of providing daily shaping of power in response to demand. Details about the other five rights as as follows:

Water Right #	Flow Rate	Priority Date
76N-W-094414-00	1,250 cfs	March 31, 1905

The five flow through rights have priority dates in the years 1905, 1906, 1909, and 1992. The 1905, 1906, and 1909 rights were confirmed by an order issued by Judge Holter on October 20, 1986. A permit for the 1992 right was issued by DNRC pursuant to the Montana Water Use Act. According to flow records, prior to 1972, PPL Montana's water rights at Thompson Falls were generally satisfied throughout most of the irrigation season except during portions of August and September. Based on the 21 year period from 1971 through 1991, PPL Montana's water rights at Thompson Falls were filled on average 294 days per year. After 1992, PPL Montana's rights have been satisfied only during the high flow periods of spring runoff. From 1993 through 2000, PPL Montana's rights at Thompson Falls were filled on average 93 days per year.

In summary, the Avista and PPL Montana hydropower rights pose the following constraints to basin water use:

VIII. Except during periods of high spring runoff (57 days per year on average), water is not likely to be available for appropriation in the Flathead River basin above Kerr Dam, and any appropriation with a priority date junior to April 3, 1920, is potentially subject to a call by PPL Montana.

IX. Except during periods of high spring runoff (93 days per year on average), water is not likely to be available for appropriation in the Clark Fork River basin above Thompson Falls Dam, and any appropriation with a priority date junior to May 13, 1992, is potentially subject to a call by PPL Montana.

a. When flows fall below 11,120 cfs, which occurs often in late summer and early fall, water is not likely to be available for appropriation in the Clark Fork River basin above Thompson Falls Dam, and any appropriation with a priority date junior to June 29, 1909, is potentially subject to a call by PPL Montana.

X. Except during the 22 days during May and June in 3 years out of 10, water is not likely to be available for appropriation in the Clark Fork River basin, and any appropriation with a priority date junior to November 19, 1974, is potentially subject to a call by Avista.

XI. Mean monthly flow statistics for total discharge for the period 1960-2003 indicate that river flows at the Noxon exceed 35,000 cfs only during May and June. This indicates that any appropriation above the Noxon Rapids Dam with a priority date junior to February 20, 1951 is potentially subject to a call by Avista.

The concern about the limited availability of water for new water rights was recently reinforced by a proposal for a decision issued by a DNRC hearings examiner in a surface water right permit application filed by Thompson River Lumber Company of Montana, Inc. (TRLC).[9] TRLC sought a permit to appropriate 250 gallons per minute (gpm), or 0.56 cfs, up to 400 acre-feet of water per year from the Clark Fork River approximately 40 miles upstream of the Noxon Rapids Dam. The hearings examiner proposed denying the permit because TRLC "...has not proven that water can reasonably be considered legally available. Applicant has proven that water is only

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76N-W-211938-00	2,000 cfs	January 29, 1906
76N-W-211939-00	5,000 cfs	December 3, 1906
76N-W-211940-00	2,870 cfs	June 29, 1909
76N-P-081517-00	12,300 cfs	May 13, 1992

[9]Proposal for Decision Application No. 76N 30010429 By Thompson River Lumber Company, March 30, 2006, Charles F. Brasen, DNRC Hearing Examiner.

available at times the flows at Noxon Rapids Dam exceed 50,000 cfs." This same logic could apparently be applied to any new water use permit application upstream of Noxon Rapids Dam, virtually closing the Clark Fork River Basin to new surface water rights as well as groundwater rights when the groundwater is connected to surface water. The recent Montana Supreme Court ruling in TU vs. DNRC clarified that two types of groundwater are connected to surface water: water within a well's cone of depression, so-called induced infiltration, and water intercepted by a well that would otherwise flow to surface water, so-called prestream capture of tributary groundwater.[10] This ruling likely means that most groundwater will be connected to surface water.

Hungry Horse Dam and Reservoir

Hungry Horse Reservoir, located near the top of the basin on the South Fork of the Flathead River Basin, was constructed and is operated by United States Bureau of Reclamation (BOR) "(f)or the purpose of irrigation and reclamation of arid lands, for controlling flood, improving navigation, regulating the flow of the South Fork of the Flathead River, for the generation of electric energy and for other beneficial uses primarily in the State of Montana, but also for downstream uses."[11] In its water rights filing with the Montana Water Court, USBR claimed 3.5 million acre-feet of storage for future sales. The priority date of BOR Hungry Horse right is June 16, 1947, earlier than the Avista rights.[12]

Hungry Horse and Future Basin Water Availability

Montana law allows public entities to set aside water for future use only through water reservations. Private entities cannot reserve water for future use. While water reservations exist in the Yellowstone and Missouri River basins, they do not exist in the Clark Fork. Hungry Horse could provide a source for future basin water development if the state would contract for a block of water now stored in the reservoir. The state could then lease water to new or existing water users. Leasing water rather than issuing new water use permits is a departure from past practice.[13] As noted above, it appears likely that water for new permits is not legally available in the Clark Fork River basin except for a brief 22-day period during 3 years out of 10 when Avista's hydropower rights are filled. A lease would differ from a new water right in three important respects. First, a water right is granted in perpetuity, so long as the conditions of the right are met. A lease would exist for a definite period up to 50 years and may be renewed once.[14] Second, except for the permitting fee, water rights are free, whereas a lease implies a payment for the amount of water leased. Third, and perhaps most important, a lease entitles the lessor to "wet" water. A water right does not guarantee water delivery; instead, it entitles the holder to a place in line for allocation of the existing supply. A new water right would have a priority date junior to all other rights in the basin, and thus may provide little if any assurance of actual water availability. A lease, on the other hand, would require the state to deliver water in return for a specific payment. Thus by contracting for water stored in Hungry Horse, the state

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[10]See June 15, 2006 memo from Kim Overcast, DNRC New Appropriations Program Manager, to DNRC Water Resources Regional Managers and New Appropriations Staff.

[11]US Code Title 43, Chapter 12, Subchapter XVII, Section 593a

[12]Water Right Number: 76J 134912-00 Statement of Claim

[13]The state has, however, issued contracts for stored water to provide instream flow in the Bitterroot River from Painted Rock Reservoir. DNRC has negotiated Water Marketing Contracts with water users associations and Water Purchase Contracts with individuals on state owned water projects throughout the state.

[14]See 85-2-141(5) MCA.

could provide new users with actual water rather than the most junior right valid only during 22 days in wet years.

Although the BOR has claimed a right to market up to 3.5 million acre feet at Hungry Horse, no contracts have been issued for Hungry Horse water. The operation of this project is subject to constraints arising from other project purposes, including flood control and hydropower generation. It is also subject to a biological opinion issued by the National Marine Fisheries Service as a result of the listing of Columbia River basin anadromous fish stocks pursuant to the Endangered Species Act. The fish and other constraints may limit the availability of water for contracts for consumptive uses. In addition, BOR has not determined the price it would charge for Hungry Horse water. Given this uncertainty, the Task Force successfully sought a resolution of the 2005 legislature urging the DNRC to "...enter into negotiations with the (BOR) to determine the availability and cost of water stored behind Hungry Horse Dam for which the State of Montana might contract to support existing water use and future water development in the Clark Fork River basin." The DNRC recently began discussions with the BOR aimed at securing a contract.

Hungry Horse and the Security of Existing Basin Water Rights

In addition to providing for new water uses, the state could lease Hungry Horse contract water to basin users with a right junior to Avista's Noxon Rapids or PPL Montana's Kerr or Thompson Falls rights. If the situation arose when either of the utilities would issue a water rights call on junior users, leased water could be released from Hungry Horse in an amount sufficient to replace the amount the junior users subject to the call would consume, eliminating the need for the call. Providing this security would require, in addition to the lease, a water management system that could follow the water released from Hungry Horse down river to the Avista and/or PPL Montana dams. Through discussions with BOR staff, the Task Force has determined that modeling tools exist that would allow the scheduling of Hungry Horse releases, although they would have to be calibrated for the Clark Fork River basin. Through this management system, junior users throughout the basin could be protected against calls by Avista or PPL Montana, not just juniors in the path of water released from Hungry Horse. For example, the owners of Willow Creek Dam in the Flint Creek watershed have water rights junior to Avista's. Any time its water rights are not filled, Avista could issue a call to stop the filling of Willow Creek Dam. If the Willow Creek owners leased Hungry Horse contract water from the state, they could mitigate such a call by causing Hungry Horse water to be released in amounts sufficient to compensate for the Willow Creek water they are storing behind their dam.

Implications for Tribal Water Rights

The Confederated Salish and Kootenai Tribes (Tribes) have taken the position that they have two types of water rights. The first is reserved rights tied to the purpose of their reservation which was to provide a tribal homeland. The priority date of the reserved rights is July 16, 1855, the date of the Hell Gate Treaty that created the reservation. The second type of water rights is pre-treaty aboriginal rights. The aboriginal rights are claimed as non-consumptive rights both on and off of the reservation tied to hunting, fishing, pasturage, and timber. The Tribes and the Montana Reserved Water Rights Compact Commission are currently in negotiations to quantify these rights. In the negotiations, the Tribes are also claiming ownership of all waters that arise on or under or flow through their reservation. The Compact Commission has not accepted this ownership position which conflicts with Montana's Constitution. Leaving aside the ownership issue, a state contract with BOR for Hungry Horse water and subsequent leases by the state to Clark Fork River basin water users could not interfere with Tribal water rights. With or without

the aboriginal rights, the Tribes have the most senior water right in the Clark Fork River basin. Their rights are senior to the BOR rights at Hungry Horse. During periods when their rights are not filled, the Tribes could make call on BOR to stop the filling the Hungry Horse reservoir. However, once water is stored in Hungry Horse, Tribal rights would not prevent BOR from issuing a contract to the state for the stored water, nor would they prevent the state from leasing the contract water to basin water users. Water stored in Hungry Horse and contracted to the state may, in fact, play a role in the compact negotiations. The compact could allocate some or all of the contract water to the Tribes for marketing to basin water users. To repeat, under Montana water law, a state contract for water stored in Hungry Horse reservoir and subsequently leased to basin water users could not and would not interfere with Tribal water rights.

Action Needed to Secure Hungry Horse Water for the Clark Fork Basin

As stated above, before the state can contract for Hungry Horse water, BOR must determine the amount and price of the stored water available for contracting. In a letter to DNRC Director Mary Sexton dated December 6, 2006, BOR Pacific Northwest Region Director Bill MacDonald provided a break down of the of the key steps necessary to complete a contract. The steps and their estimated costs and time requirements are: (1) completion of a revised cost allocation, $260,000 and 1.5 years; (2) completion of land classification studies if irrigation water is involved;[15] (3) completion of an ability-to-pay study if irrigation water is involved, $25,000 and 240 hours; (4) completion of environmental compliance activities, $1-2 million and 2-4 years; (5) completion of a water needs assessment, $2,600 and 40 hours; (6) obtaining the required approval to enter into new contracts, $2,600 and 40 hours; and (7) preparation and negotiation of the contracts $3,250 and 50 hours plus the time of the actual negotiation.

A new allocation of the remaining $12 million of Hungry Horse project costs is necessary because current project costs are allocated only to flood control (30%) and hydropower production (70%).[16] The state contract would presumably include irrigation and municipal and industrial uses to which costs could be allocated.[17]

The state has not yet decided whether or how much to water to request. In her October 17, 2006 letter to Regional Director MacDonald, Director Sexton asked about the cost and timing of a potential request from the state for 50,000 to 250,000 acre-feet in increments of 50,000 acre-feet. State law currently limits the total amount of water that the state may lease for all beneficial uses to 50,000 acre-feet.[18] According to Regional Director MacDonald, all water contracted from BOR does not have to be allocated in any given year. Should the state contract for more than

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[15]The cost and time required for this study depends on the amount of land involved. BOR provided estimates for three acreage ranges: (1) 500 through 5,000 acres, $9 per acre plus $5-8,000 for an economic analysis with an estimated completion time of 4 months, (2) 5,000 through 10,000 acres, $6 per acre plus $5-8,000 for an economic analysis with an estimated completion time 6 months, and (3) over 10,000 acres, $5 per acre.

[16]Flood control costs are born by the US taxpayer. Flood control beneficiaries, therefore do not directly repay project costs. Only the 70% born by hydropower production is currently being repaid.

[17]In a cost allocation, irrigation assumes only that portion of the project costs that it can afford to pay according to a BOR analysis.

[18]See 85-20141(4) MCA. Whether this statute means that the state can lease only 50,000 acre-feet in any one year or from any single federal reservoir is not clear. This 50,000 acre-feet limit does not appear to limit the amount of water for which the state could contract with the BOR for Hungry Horse water.

50,000 acre/ft, it would effectively reserve that amount of water for use in Montana's Clark Fork River basin against future uses in downstream states. The State of Washington has enacted a statute allowing it to divert up to an additional 1 million acre-feet of water from the Columbia River. While such an allocation may not come directly from Hungry Horse reservoir, it would likely impact the operation of the system of dams in the Columbia River basin, including both Hungry Horse and Libby reservoirs in Montana.[19] Other downstream states may also act to divert additional Columbia River basin water. The Columbia basin states do not have an equitable apportionment of Columbia water, an interstate compact, or other vehicle for coordinating Columbia water allocations. Contracting for Hungry Horse water is the most straight forward method Montana can use to reserve water its water users.

To proceed with contracting, the state must make a request for a specific amount of water and pay the BOR for some or all of the contracting steps. DNRC did not include any funds for contracting in its budget request, and none were included in the governor's budget. Since it is a necessary first step, the Task Force recommends that DNRC seek the $260,000 from the 2007 legislature to pay for the new cost allocation. In addition, the Task Force recommends that the water marketing statute be amended to increase the water marketing cap.

Conclusion

No water is legally reserved for future water use in the Clark Fork River basin. Lower basin hydropower rights likely mean that no more water is legally available in the basin for new surface water rights and groundwater rights connected to surface water. This implication is supported by a recent proposed permit decision by a DNRC hearings examiner. Water now claimed by BOR in its water right filing for storage in Hungry Horse reservoir could provide for new basin water development and to protect water uses based on water rights junior to the hydropower rights. In response to House Joint Resolution 3 adopted by the 2005 legislature, DNRC has begun discussions with BOR to determine the amount and price of Hungry Horse water available for which the state might contract. Such a contract is the most straight forward means to reserve for Montana's Clark Fork River basin water users. The state could lease contracted Hungry Horse water to provide for new water uses and to increase the security of water uses based on water rights junior to the lower basin hydropower rights. In light of pending competition for Columbia River basin water by downstream states, DNRC needs to move promptly to determine an amount of water for which it might contract and the costs of that contracting process so that it can request the needed funds from the 2007 legislature and begin the contracting process.

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[19]The three significant storage reservoirs in the Columbia River system in the US are Lake Roosevelt created by Grand Coulee Dam, Lake Koocanusa created by Libby Dam, and Hungry Horse reservoir. Any significant additional diversion and consumption of Columbia River water may, therefore, affect the operation of one of all of these dams and the amount and timing of their water storage.

Appendix 4
Groundwater Data Bill Draft
December 18, 2006

85-2-501. Definitions. Unless the context requires otherwise, in this part the following definitions apply:

(1) "Aquifer" means any underground geological structure or formation which is capable of yielding water or is capable of recharge.

(2) "Aquifer test" means measuring the observed change in water level in an aquifer to pumping a well with the goal of calculating the aquifer's hydrologic characteristics.

(~~2~~3) "Bureau" means the Montana state bureau of mines and geology provided for in 20-25-211.

(~~3~~4) "Ground water" means any water that is beneath the ground surface.

(4~~5~~) "Ground water area" means an area which, as nearly as known facts permit, may be designated so as to enclose a single and distinct body of ground water, which shall be described horizontally by surface description in all cases and which may be limited vertically by describing known geological formations should conditions dictate this to be desirable.

(6)"Groundwater data" means water-level, water-quality, geophysical-log, aquifer-test or other groundwater data.

85-2-516. Well logs. (1) Within 60 days after any well is completed, the driller shall file with the bureau a well log report.

(2) Except as provided in subsection (3), the well log report must be filed on a form specified by the department in consultation with the board of water well contractors provided for in 2-15-3307 and the bureau. The driller must provide a location for the well using at least two methods as specified on the form.

(3) The bureau may allow submission of the well log report in an electronic format that is in accordance with the form specified as provided in subsection (2).

(4) The bureau may return the report for refiling if it is incomplete or incorrect.

NEW SECTION. Aquifer tests. (1) Aquifer tests required by a state agency must be forwarded by the agency to the bureau.

(2) Except as provided in subsection (3), the aquifer test report must be filed on a form specified by the department in consultation with the department of environmental quality and the bureau.

(3) The bureau may allow submission of an aquifer test report in an electronic format that is in accordance with the form specified as provided in subsection (2).

NEW SECTION. Groundwater data. (1) Groundwater data acquired through studies conducted or funded by a state agency, including units of the Montana University System, shall be forwarded to by the agency collecting or funding the collection of the data to the bureau.

(2) Except as provided in subsection (3), the groundwater data must be filed on a form specified by the department in consultation with the department of environmental quality and the bureau.

(3) The bureau may allow submission of the groundwater data in an electronic format that is in accordance with the form specified as provided in subsection (2).

NEW SECTION ALTERNATIVE. Groundwater data. (1) State agencies shall forward to the bureau abstracts of reports of groundwater data acquired through studies conducted or funded by a state agency, including units of the Montana University System. The abstracts shall include the type of groundwater data and the location at which it was collected, and how the public might view the data.